Supreme Court of the United States

OCTOBER TERM, 1894.

Filed June 24, 1895.

THE SOUTHERN PACIFIC RAILROAD COMPANY,
Plaintiff in Error,

vs.

ISAAC T. HILL,
Defendant in Error.

In Error to the Supreme Court of California.

BRIEF FOR PLAINTIFF IN ERROR.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No. 158.

THE SOUTHERN PACIFIC RAILROAD COMPANY,
Plaintiff in Error,

vs.

ISAAC T. BELL,
Defendant in Error.

IN ERROR TO THE SUPREME COURT OF CALIFORNIA.

BRIEF FOR PLAINTIFF IN ERROR.

Statement.

The Southern Pacific Railroad Company was authorized by Section 18 of the Act of Congress entitled "An Act granting lands to aid in the construction of a Railroad and Telegraph Line

from the States of Missouri and Arkansas to the Pacific Coast" and approved July 27, 1866 (14 U. S. Stat., 292), to connect with the Atlantic and Pacific Railroad at such point near the boundary line of the State of California as it should deem most suitable for a railroad line to San Francisco. To aid in the construction of the proposed road a grant of ten alternate sections of land per mile on each side of the road was given by Congress to said Southern Pacific Railroad Company whenever on the line thereof the United States had full title, not reserved, sold, granted or otherwise appropriated and free from pre-emption or other claims or rights at the time the line of said road was designated by a plat thereof filed in the office of the Commissioner of the General Land Office (Section 3 of Act of 1866).

It being understood by Congress at the time of the passage of the act that a part, and possibly a very large part, of the ten alternate sections so granted to the railroad might be "otherwise appropriated," and Congress being desirous that the railroad should have its full quota of lands to aid it in the construction of its road, it was by the same act further provided

that whenever at the time of designating the line of road any part of said ten alternate sections per mile on each side of the road should have been granted, sold, reserved, occupied by homestead settlers, or pre-empted or otherwise disposed of, other land should be selected by the Company in lieu thereof under the direction of the Secretary of the Interior, in the odd-numbered sections located not more than ten miles beyond the limits of said ten alternate sections (Section 3 of Act of 1866).

Upon the 3d of January, 1867, the plaintiff in error duly designated the line of its road by filing a plat thereof on that day in the office of the Commissioner of the General Land Office (Record, p. 3).

By the 6th section of the Act of Congress, approved July 27, 1866 (14 U. S. Stat., 292), it was provided that as soon as the general route was fixed by filing a plat thereof, designating the line of the road, the lands for forty miles in width on both sides of the line of said road should be surveyed and that the odd sections should not be liable to sale or entry or pre-emption before or after they were surveyed, except by the plaintiff in error.

At the time the line of the road was so designated (January 3, 1867), the S. E. ¼ of section 5, township 23 south, range 23 east, Mount Diablo meridian, containing 160 acres, which lay in one of the odd-numbered sections within 20 miles of the line of the road, had been granted and otherwise disposed of by the United States (Record, p. 4).

After the designation of the line of road, the plaintiff in error filed maps of the definite location of its railroad in seventeen sections, all of which maps were accepted and approved by the Commissioner and the Secretary of the Interior.

The land in controversy, which is the N. E. ¼ of section 7, township 17 south, range 16 east, Mount Diablo meridian, containing 160 acres, is situated in the County of Fresno, California, is a part of an odd-numbered section distant more than 20 miles from but lying within 30 miles of the line of the Southern Pacific Railroad as designated by the said map filed January 3, 1867, and also as definitely located and constructed, is opposite to and coterminous with the section of the Southern Pacific Railroad Company extending from Huron to Alcalde, a map of the definite location and construction of which was filed in the office of and duly accepted

and approved by the Secretary of the Interior on April 13, 1889, and was at the time of the passage of the Act of July 27, 1866, vacant and unappropriated public land, and has ever since so remained, excepting only as it has been effected by the facts set forth in the complaint (Record, p. 4).

On the 26th day of July, 1893, the plaintiff in error duly selected the land in question in lieu of the 160 acres heretofore referred to within the place limits of the grant which had been previously disposed of by the United States at the time of filing the plat designating the line of the road (January 3, 1867).

This selection was made in proper form and in all respects as required by the instructions issued by the Secretary of the Interior, and under the direction of the Secretary of the Interior (Record, p. 5).

The Railroad Company had not, at the time the said selection was made, nor has it since, selected or received land to the extent or amount granted it by the Act of July 27, 1866 (Record, p. 5).

Prior to such selection by the Southern Pacific Railroad Company of the land involved in this suit to indemnify it for the 160 acres lost within

its place limits, the United States on September 15, 1892, issued and delivered its patent conveying to the defendant in error, Isaac T. Bell, the legal title to the land involved in this suit.

After its selection of the land in question and on the 9th day of August, 1897, the Southern Pacific Railroad Company filed its complaint in this case in the Superior Court of the State of California, in and for the County of Fresno, praying that the said Isaac T. Bell should be decreed to hold the legal title to said land in trust for and to convey the same to the Southern Pacific Railroad Company (Record, p. 2).

The defendant filed a demurrer to the complaint (Record p. 6), and on the 15th of August, 1898, a judgment was entered sustaining the defendant's demurrer (Record, p. 7). From this judgment sustaining the demurrer to the complaint, an appeal was taken by the Railroad Company to the Supreme Court of the State of California and on the second day of September, 1899, the judgment of the Superior Court in and for the County of Fresno was affirmed by the Supreme Court of the State of California *upon the sole ground that the complaint did not*

state facts sufficient to constitute a cause of action (Record, p. 18).

The case was then brought here by writ of error to the Supreme Court of the State of California under the provisions of Section 709 of the Revised Statutes of the United States.

Assignment of Errors.

The Supreme Court of the State of California erred:

1. In not reversing the judgment of the Superior Court in and for the County of Fresno and in not overruling the demurrer of the defendant to the complaint herein.

2. In not holding that the Act of Congress approved July 27, 1866, entitled "An Act granting lands to aid in the construction of a railroad and telegraph line from the States of Missouri and Arkansas to the Pacific coast," granted to the plaintiff in error the land involved in this suit.

3. In not holding that the land involved in this cause was on January 3, 1867, when the map designating the line of the railroad was filed, and has ever since been withdrawn from the public domain by reason of said grant to the plaintiff

of July 27, 1866, and that at all times since January 3, 1867, the land officers of the United States have been without authority or power to release the land from said withdrawal or to dispose of it otherwise than to the plaintiff in error.

4. In not holding that the plaintiff in error became entitled to a patent from the United States for the land in controversy upon its selection thereof on July 26, 1893, and that whatever title thereto was then held by the defendant in error was held by him in trust for and under an obligation to convey the same to the plaintiff in error.

5. In not holding that the defendant in error held whatever title he had to the land in controversy by reason of the patent to him from the United States dated September 15, 1892, in trust for the plaintiff in error.

6. In not holding and adjudging that the defendant in error should convey to the plaintiff in error whatever title to the land he acquired by the patent to him from the United States dated September 15, 1892.

7. In holding that the words "hereby granted" as used in the Act of Congress approved July 27, 1866, referred to in the complaint herein, do

not include the odd sections of land within the indemnity limits of the grant.

8. In holding that the land in controversy was subject to pre-emption entry or sale after the filing by the plaintiff in error on January 3, 1867, of the map of the general route of its railroad.

9. In holding that the rights of the defendant in error in said land are based on the pre-emption laws of the United States and upon compliance therewith.

10. In holding that the selection by the plaintiff in error of said land was not made under the direction of the Secretary of the Interior.

FIRST POINT.

The Southern Pacific Railroad Company was equitably entitled to a patent for the land in question as soon as selection thereof had been made.

1.

There was a deficiency in the place limits of the grant to the plaintiff in error under the Atlantic and Pacific Act of July, 1866, and the 160 acres involved in this suit were selected by the railroad from within the indemnity limits of said grant

to make good such deficiency. Prior to such selection the United States had patented the land to the defendant in error.

The single question presented upon this writ of error is whether the land within the indemnity limits of the grant under the Act of 1866 was open to the public for pre-emption and sale after the filing of a plat designating the line of the road.

If such is the construction to be placed upon the Pacific Railroad Acts, the grant of the lands within the indemnity limits is certainly shorn of much of its supposed value and efficiency. The deficiency in the place lands cannot be determined until long after the date of the grant, and only when the line of the road has been definitely located, and the land has been surveyed. If during all this time, while the railroad is powerless to make any selection within the indemnity limits of its grant, the indemnity lands could be taken up by settlers, it would result in a serious impairment of the value of the grant and it is not clear what practical purpose there would be in making such a grant to the Railroad Company. It is to be supposed that Congress desired to give in aid of and to encourage the building of the

Southern Pacific Railroad through what was then a great stretch of desert country ten alternate sections of land per mile on each side of the road as built by it. Congress of course contemplated that very likely a considerable portion of these ten alternate sections had prior to the grant been taken up by settlers, and to ensure the certainty of the railroad getting its full amount of ten alternate sections per mile, it provided that for such land as should be already taken up and otherwise disposed of at the time of the grant, the railroad should have the right to select an equal amount from lands lying within certain other limits, commonly called indemnity limits. It would seem idle to say that Congress had given the right to the railroad to make selections from lands within certain defined but uncertain boundaries (knowing such selection must necessarily be made in the distant future) and at the same time intended that such lands should be open for settlement by the general public during all the period, when the hands of its grantee were necessarily tied, and it was prevented from making a selection therefrom. It is difficult to see how such an intention can seriously be imputed to Congress. The grant of the

indemnity limits was presumably made in good faith. That being so, it is not possible to place such a construction upon it as to virtually make it a nullity and to impute to Congress an intention to indirectly permit to be taken from its grantee what it had directly and clearly and in good faith given to it.

We quote the words of Mr. Justice BREWER in Wisconsin Central Railroad Company vs. Forsythe, 159 U. S., 46, 57, simply changing the name of the railroad and the number of the sections granted to fit the present case as follows:

> " For whose benefit was the withdrawal of the lands within the indemnity limits of the *Southern Pacific* road made? Obviously, as often declared, for the benefit of the grantee. It is as though the United States had said to the grantee: 'we do not know whether along the line of road, when you finally locate it, there will be *ten* alternate sections free from any pre-emption or other claim, and, therefore, so situated, that you may take title thereto, and so we will hold from sale or disposal to any one else an additional territory of *ten* miles on either side that within those *ten* miles you may select whatever lands may be necessary to make the full quota of *ten* sections per mile.'" (Italicised words are our own.)

The very terms of the granting act (14 U. S. Stat., 292) seem to settle the question conclusively, for by the sixth section of the act it was expressly provided that, after the general route should have been fixed, the President of the United States should cause the lands to be surveyed for forty miles in width on both sides of the entire line of the road, and that the odd sections of land granted by the act should not be liable to sale, or entry, or pre-emption before or after they were surveyed except by the railroad company as provided in the act. The full text of this section of the act is as follows:

> "SEC. 6. And be it further enacted, that the President of the United States shall cause the lands to be surveyed for forty miles in width on both sides of the entire line of said road after the general route shall be fixed, and as fast as may be required by the construction of said railroad; and the odd sections of land hereby granted shall not be liable to sale or entry or pre-emption, before or after they are surveyed, except by said company, as provided in this act; but the provisions of the act of September, eighteen hundred and forty-one, granting pre-emption rights, and the acts amendatory thereof, and of the Act entitled 'An act to secure homesteads to actual settlers on the

> public domain,' approved May twenty, eighteen hundred and sixty-two, shall be, and the same are hereby, extended to all other lands on the line of said road when surveyed, excepting those hereby granted to said company."

Now, how was it "provided in this act" that the railroad company should have the odd sections of land referred to in the foregoing section? As to the first ten odd sections within the place limits, the railroad was to have all of them which had not been previously "otherwise appropriated" at the time the line of road was designated (January 3, 1867). As to the odd sections within the additional ten miles, or the indemnity limits of the grant, the railroad was to have all of them, provided the deficiency in its place limits was equal thereto. That is to say, the railroad was to make up as far as possible losses in its place limits by selecting land from the indemnity limits. In other words, the railroad was, if possible, to have its ten sections of land whether it took them from within its place limits or by reason of deficiency within the latter was obliged to resort to the indemnity limits of its grant.

The entire grant of land by this act was not to be liable to sale or entry or pre-emption, after

the filing of the plat designating the line of road, except by the railroad, and it is not easy to see how any stronger or more apposite words could have been used by Congress to effectuate and accomplish this purpose than the ones found in the 6th Section of the act. Nothing was left to be done in the future by any officer or employee of the government. There was no direction that the Secretary of the Interior should withdraw these lands from sale or entry or pre-emption, or that any selection by the company should be approved by the Secretary of the Interior. The withdrawal of the lands was by Congress itself, and such withdrawal certainly could not be revoked by any officer of an executive department of the Government, or in any other way, unless it was by a subsequent Act of Congress.

If would therefore seem very clear that the land in question was not open to entry and pre-emption by the defendant in error, unless it is possible to say that the land within the indemnity limits of the grant to the Southern Pacific Railroad Company was not intended to fall within the provisions of Section 6 of the granting act and the entire argument of the other side comes to this one proposition, viz.: THAT THE

WORDS "HEREBY GRANTED," USED IN SAID SECTION 6, ARE LIMITED TO LANDS IN PLACE AND DO NOT INCLUDE LANDS WITHIN THE INDEMNITY LIMITS OF THE GRANT.

It is not easy to perceive the force of this argument. The source of the title of the Railroad Company to the indemnity lands as well as the place lands would seem to be the same. It acquires both classes of land under the Act of 1866. If it does not acquire its indemnity lands under this act, then what is the origin of its title thereto? If it does obtain its title to these indemnity lands by reason of the Act of Congress of 1866, then it must be that such lands are granted to the Railroad Company by such act.

As was said by Secretary Noble in the case of Chicago, St. Paul, Minneapolis and Omaha Ry. Co., IX. L. D. 465, 468:

> "Certainly, if the right to the lien lands is not conferred by the grant, it is difficult to discern whence that right is derived or how the Company can by any possibility acquire any title thereto. It cannot be obtained by selection alone, or possession, or arise out of the exigencies of the case."

It is difficult to see how the source of the title of the Railroad Company to the two classes

of lands can be otherwise than the same. We take it that the only difference is as to the manner of the perfecting such title. In the case of the place lands the title thereto was perfected by filing the map of definite location, which, in this case, was on April 13, 1889, nearly twenty-three years after the date of the granting act. In the case of the indemnity lands the title was perfected by selection, which, in the present case, took place in July, 1893, twenty-seven years after the granting act.

Our understanding is that in each case the origin of the title to the land when perfected was the Act of July, 1866; that such title was not initiated by the selection of the indemnity land any more than it was in the case of the place land by filing the map of the definite location of the road. The two steps are of a similar nature, and are but the completing, and not the initiating, of the title, which has the same source—viz., the Act of Congress of 1866.

It can hardly be said that the title to indemnity lands begins and ends with the selection thereof, for it has been held by this Court, in St. Paul & Pacific Co. vs. Northern Pacific Co., 139 U. S., 1, that selection is not even necessary when the de-

ficiency in the place limits of a grant is greater than the amount of the indemnity lands applicable thereto. As to this the Court said, at page 19:

> "As to the objection that no evidence was produced of any selection by the Secretary of the Interior from the indemnity lands to make up for the deficiencies found in the lands within the place limits, it is sufficient to observe that all the lands within the indemnity limits only made up in part for these deficiencies. There was, therefore, no occasion for the exercise of the judgment of the Secretary in selecting from them, for they were all appropriated."

It is, however, not clear that the source of the title to indemnity lands is affected in any way by whether such title is initiated by selection or not. We will concede that it is so initiated, yet such right of selection is given and created by the Act of 1866, and does not exist by reason of anything outside of such act. Such right of selection would then seem to be the source of the title to the indemnity lands, and, as such right was given by the Act of 1866, the title to the indemnity lands acquired by the exercise of such right given to the grantee thereunder must be deemed to be derived from such act and included within the term "lands hereby granted" used therein.

It is, however, unnecessary to discuss this question, for it has been decided by the Courts many times that the words "hereby granted," as used in the various Acts of Congress granting lands in aid of railroads, include lands within the indemnity limits of the grant as well as within the primary limits of such grant.

In Northern Pac. R. Co. vs. United States, 36 Fed. Rep., 282, 287, Mr. Justice BREWER, then Circuit Judge, said:

> "Again, with reference to the suggestion that the expression 'lands granted' ordinarily refer in land legislation to lands in place, the truth is that the expression has a double meaning. Its narrower one is, of course, lands in place; but it is frequently used to include all lands donated by the Government, whether lands in place or indemnity lands (Barney vs. Railroad Co., 24 Fed. Rep., 889; Railroad Co. vs. Railroad Co., 112 U. S., 730; 5 Sup. Ct. Rep., 334). Indeed, in this very resolution, the words are used in the larger sense. Thus, the proviso is, 'provided that all lands hereby granted to said company which shall not be sold or disposed of * * * at the expiration of five years, after the completion of the entire road, shall be subject to settlement and pre-emption, like all other lands, etc. Obviously this refers to all the lands which had passed to the

> company, whether lands in place or indemnity lands. Further, and in the same clause, appears the same word, 'granted,' in manifestly the same sense, so that in the very resolution the words 'granted lands' or 'lands granted' are used in the larger sense, and it naturally enforces the conviction that they were used in the same broad sense in this clause."

In Barney vs. Winona & St. P. R. Co., 24 Fed. Rep., 889, Mr. Justice BREWER construed the word "granted" as including indemnity lands as well as place lands. He said at page 892:

> " We hold that the term 'any lands which may have been granted to the territory or state of Minnesota' in the proviso of Section 3 of said act, includes all land the title to which had passed to the territory or state of Minnesota, *whether these lands were lands in place or indemnity lands*, and the word 'granted' has the broad rather than the narrow signification."

In Northern Pacific Rd. Co. vs. Barnes, 2 North Dakota Rep., 310, one of the questions involved was whether the railroad company had such a title to lands within the indemnity limits of the Northern Pacific Act of July 2, 1864 (13 Stat. at Large, 356), as would enable it to file a complaint to restrain the sale of such land for taxes. The

Court held in the affirmative, and said at page 360:

> "The indemnity lands are therefore granted equally with the place lands, or lands within the forty-mile limits, by this act. They are of the 'amount of twenty sections per mile' granted, and the words 'thereby and hereby is granted' apply to them, and pass the title. The only distinction between the two classes of land is the method by which they are identified. Once identified, the company has the same title to the one as to the other. The indemnity provision does not make an additional grant, but simply points out the method by which lands already granted may be identified."

In Chicago, etc., Ry. Co. vs. Sioux City, etc., Rd. Co., 3 McC., 280, 300, it was said:

> "The lands in place and the indemnity lands were granted by Congress for precisely the same purposes. The intention of the grantor with respect to them was exactly the same. Both were subject to the same trusts. The mode of making the title of the trustee specific was different. * * * "

In his decision of the Chicago, St. Paul, Minneapolis and Omaha Ry. Co. case, IX. L. D., 465–468, rendered on October 7, 1889, Secretary Noble, in construing the meaning of the phrases "*land hereby granted*," "embraced in the *grant*

of lands," and like phrases, as used in the congressional acts granting railroad lands, made the following interesting review:

> "But it is urged that by the use of the expression, '*grant of lands*,' Congress meant really granted lands, or lands within the primary limits of the grant. I cannot concur in this view. The history of the legislation of Congress will doubtless show many instances wherein *indemnity*, and lands other than place lands, are referred to as *granted* lands. One or two instances suggest themselves to me, and may be briefly referred to.
>
> By the ninth section of the Texas Pacific act (16 St., 576), it is provided that if, in the too near approach of said railroad to the Mexican border, the number of sections to which the company is entitled cannot be selected on the line of the road, then a like quantity of land may be selected elsewhere; 'provided that no public lands are *hereby granted* within the State of California further than twenty miles on each side of said road, except to made up deficiencies as aforesaid.'
>
> Here *indemnity lands* to be selected for other lost indemnity lands are included in the category of lands '*hereby granted*.' Also in the case of the Burlington and Missouri River grant, the only one of quantity without lateral limits now recalled, and where the land is to be obtained by *selection* anywhere along the line of the road, the

language of the act is, that (Sec. 19, Act July 2, 1864, 13 St., 356), 'there be and hereby is *granted*,' provided the company accept '*this grant*' within one year, when the Secretary 'shall *withdraw* the lands embraced in *this grant* from market.' And the Supreme Court in 98 U. S., 334, construing the act, speak of it all the way through as a '*grant*,' and of the lands as '*granted lands*,' and uphold the right of the company to select them anywhere along the general direction of the road, within lines perpendicular to it at each end. * * *

"So in 24 Fed. Rep., page 892, Barney vs. Winona, it was held that the expression 'lands which may have been *granted* to the Territory or State of Minnesota,' includes *all lands* the title to which had passed to the Territory or State of Minnesota, whether these lands were lands in place or *indemnity lands*, and the word *granted* has the broad, rather than the narrow, signification.

"So in the St. Paul vs. Winona Railroad, 112 U. S., 730, referring to the significant fact that both acts there quoted speak of additional sections 'to be *selected* a word wholly inapplicable to lands in place,' the Court says, 'we think, therefore, that these *additional lands granted* to the appellant * * * are lands to be selected,' etc.

"These citations, doubtless, might be multiplied largely, but they are sufficient, inasmuch as they show that the expressions

> '*lands granted*,' '*granted lands*,' '*lands within the grant*,' and similar expressions, have not such narrow and technical meaning as to restrict the use of them to lands in place, or within the primary limits of a grant. On the contrary, such expressions are to be construed liberally and broadly, not standing alone, but in connection with the whole context of the act, and its true meaning gathered therefrom. Therefore, on a full consideration of the subject, I am of the opinion that when Congress spoke of the failure of the Commissioner of the General Land Office to 'have the lands withdrawn from market embraced in the grant of lands,' etc., it meant the lands in both the primary and indemnity limits."

While there may, perhaps, not be in this court any such clearly-defined decision as the foregoing upon the exact question of whether the words "lands hereby granted" include indemnity lands as well as place lands, yet the case of Wood vs. Beach, 156 U. S., 548, substantially so defined such words, when it was said by Mr. Justice BREWER at page 551 in speaking of the plaintiff in the case:

> "He deliberately took the chances of *the railway company's grant*, being satisfied out of lands within the place limits or *by selections of lands within the indemnity limits*

other than this, and trusted that in such event this tract would be restored to the public domain and he gain some advantage by reason of being already on the land."

It would therefore seem clear, both on reason and on precedent that the words "land hereby granted" include the indemnity lands as well as the lands within the place limits of the grant to the Southern Pacific Railroad under the Act of 1866.

2.

Aside entirely from the very technical and extremely narrow construction of the words "lands hereby granted," which will probably be strenuously pressed by counsel for the defendant in error, the real question before the Court is: Can indemnity lands withdrawn from sale, entry or pre-emption by the act granting them to the railroad be bought or pre-empted by others before selection by the railroad company?

It would seem too obvious for argument that, as we have before pointed out, the creation by a statute of the right in the distant future to select certain lands in lieu of deficiencies in certain other lands (such deficiencies also to be deter-

mined in the future) would be an idle matter if such lands were to be open for sale to, and settlement by, the general public during the period when the original grantee was necessarily prevented from exercising his right of selection, and the question has often been decided by the Federal Courts in favor of the grantees of such right of selection; viz., the railroad companies.

It has already been held by this Court that a section in the Northern Pacific Act of 1864 (13 U. S. Stat., p. 365), which is substantially identical with the sixth section of the act in question was equivalent to a withdrawal of the lands granted to the railroad company by the Secretary of the Interior, and that any withdrawal by the Secretary was only giving publicity to what the law had already done. This was held in the case of St. Paul and Pacific vs. Northern Pacific, 139 U. S., 1, where it was said at page 17:

> "The Northern Pacific Act directed that the President should cause the lands to be surveyed forty miles in width on both sides of the entire line of the road, after the general route should be fixed, and as fast as might be required by the construction of the road, and provided that the odd sec-

tions of land granted should not be liable to sale, entry or pre-emption, before or after they were surveyed, except by the company. *They were, therefore, excepted by that legislation from grants, independently of the withdrawal by the Secretary of the Interior.* His action in formally announcing their withdrawal was only giving publicity to what the law itself declared. The object of the withdrawal was to preserve the land unincumbered until the completion and acceptance of the road."

In Buttz vs. Northern Pacific Railroad, 119 U. S., 55, it was said by Mr. Justice FIELD, at page 72:

> "When the general route of the road is thus fixed in good faith, and information thereof given to the Land Department by filing the map thereof with the Commissioner of the General Land Office, or the Secretary of the Interior, *the law withdraws from sale or preëmption the odd sections to the extent of forty miles on each side.* The object of the law in this particular is plain: it is to preserve the land for the company to which, in aid of the construction of the road, it is granted."

It is to be observed that the Northern Pacific Act and the Atlantic and Pacific Act are substantially identical in terms in respect to this

question, and that, therefore, any decision in this regard under the Northern Pacific Act is direct authority in the present case.

It may, however, be suggested that the Buttz case arose in the Territory of Dakota, and that under the Northern Pacific Act, as well as the Atlantic and Pacific Act, the railroad when it passed through a territory was given twenty odd sections per mile, that its place limits in Dakota were therefore forty miles from its roadbed, and that consequently the Buttz case had nothing to do with the question of the withdrawal of *indemnity* lands by the granting act itself.

We say in answer to this proposition that the language of the Buttz case was very evidently directed to the lands within the forty-mile belt throughout the entire length of the Northern Pacific Road, which passed through States as well as Territories, and that it was in no way limited to the particular situation in the Territory of Dakota.

A further answer to this possible argument of the counsel for the defendant in error is that the subsequent case above cited of St. Paul & Pacific vs. Northern Pacific, 139 U. S., 1, related to lands within the State of Minnesota, and that,

therefore, the doctrine of withdrawal by force of the Act of Congress, which was declared in that case related to *indemnity* lands as well as lands in place.

In the case of Southern Pacific R. Co. vs. Groeck, 68 Fed. Rep., 609, Judge Ross, in discussing the language in the Buttz case and the St. Paul case, which we have just cited, said, at page 616:

> "It does not seem to me that the language used by the Supreme Court in these cases admits of any other construction than that the odd sections included within the indemnity, as well as the primary, limits of the grant to the Northern Pacific Company, were withdrawn for the benefit of the grantee from sale, pre-emption, homestead entry or other disposition."

If, therefore, we are right in our conclusion that the land within the indemnity limits of the grant to the Southern Pacific Railroad Company was withdrawn from sale, entry or pre-emption because of the provisions of the 6th section of the Act of 1866, and that such withdrawal was at least equivalent to a withdrawal by the Secretary of the Interior, then it would seem as if the case of Wood vs. Beach, 156 U. S., 548, was a

decision directly in point and in favor of the plaintiff in error in the case at bar.

In the Wood case the facts were as follows: By the Act of July 26, 1866, entitled "An Act granting lands to the State of Kansas to aid in the construction of a Southern Branch of the Union Pacific Railway and Telegraph, from Fort Riley, Kansas, to Fort Smith, Arkansas" (14 U. S. Stat., 289), lands to the extent of five alternate sections per mile on each side of the road were granted in aid of the Union Pacific Railroad, and if it should appear at the time the road was definitely located that any of such land had been sold or otherwise appropriated, then lands within certain indemnity limits were granted in lieu of any such deficiency. By the 4th section of this act it was provided "That as soon as said Company shall file with the Secretary of the Interior maps of its line, designating the route thereof, it shall be the duty of said Secretary to withdraw from the market *the lands granted by this act*, in such manner as may be best calculated to effect the purposes of this act and subserve the public interest."

A map of the line as required by the section quoted was filed December 6, 1866, and in the

following spring orders of withdrawal were made by the Department of the Interior in pursuance of said 4th section of the act withdrawing the "lands granted" by the act. In June, 1870, Wood, the husband of the defendant, moved upon the land, which was within the indemnity limits of the grant to the railroad company, and sought to enter it as a homestead. In August, 1872, the land in question was selected and subsequently patented to the railroad company, which conveyed it to the plaintiff Beach, who brought his action to recover possession of the land in the District Court of Allen County, Kansas. Judgment was rendered in favor of the plaintiff, which judgment was affirmed by the Supreme Court of the State. The case was then brought to this Court by writ of error, where the judgment of the State Court was affirmed.

The important questions determined by this case were (1) that indemnity lands were included within the term "lands granted by this act," which are the equivalent of the words "land hereby granted," found in the section of the act now under consideration, and (2) that where there was a withdrawal of such lands (it would seem immaterial whether such withdrawal was

by the very terms of the act itself or by the order of the Secretary of the Interior), they were not subject to sale, entry or pre-emption by any one except the railroad company. In the opinion, at pages 550, 551, Mr. Justice BREWER said:

> " *These withdrawals were not merely executive acts, but the latter one at least was in obedience to the direct command of Congress.* Section 4 of the act granting lands to aid in the construction of what is now known as the Missouri, Kansas and Texas Railway Act of July 26, 1866, C. 270, §§ 4, 14, Stat. 290, is as follows:
>
> "'SEC. 4. And be it further enacted, That as soon as said company shall file with the Secretary of the Interior maps of its line, designating the route thereof, it shall be the duty of said Secretary to withdraw from the market *the lands granted by this act* in such manner as may be best calculated to effect the purposes of this act and subserve the public interest.'
>
> " The map of the line of definite location called for by this section was filed on December 6, 1866, and the withdrawal followed in the succeeding spring.
>
> " Upon these admitted facts it is clear that Mr. Wood acquired no equitable rights by his occupation and settlement. He went upon lands which were not open to homestead or pre-emption entry, and cannot make

his unauthorized occupation the foundation of an equitable title. He was not acting in ignorance, but was fully informed both as to the fact and the law. *He deliberately took the chances of the railway company's grant being satisfied out of lands within the place limits, or by selections of lands within the indemnity limits other than this*, and trusted that in such event this tract would be restored to the public domain and he gain some advantage by reason of being already on the land. But the event he hoped for never happened. The party for whose benefit the withdrawal was made complied with all the conditions of title and took the land."

The case of Northern Pacific Railroad vs. Musser-Sauntry Co., 168 U. S., 604, is an authority to the effect that a withdrawal of indemnity lands included within a railroad grant is effective as against a grant of the lands to another railroad under a subsequent Act of Congress. In the course of his decision Mr. Justice BREWER said at page 611:

"All that we here hold is, that when a withdrawal of lands within indemnity limits is made in aid of an earlier land grant and made prior to the filing of the map of definite location by a company having a later grant—the latter having such words of exception

and limitation as are found in the grant to the plaintiff—it operates to except the withdrawn lands from the scope of such later grant."

But two distinctions can be suggested between the case cited and the case at bar. (1) In the former the withdrawal of the indemnity lands was by the Department of the Interior, while in the present case it was by the terms of the granting act itself. (2) The claimant of the indemnity lands in the case referred to was a railroad company and in the case at bar an individual. We are unable to see that these two distinctions in any way affect the value of the Musser-Sauntry case as an authority in the present discussion to show that indemnity lands, after withdrawal and prior to selection by the railroad company, are not open to sale, entry or pre-emption.

As we understand the decision in the case of The United States vs. Colton Marble and Lime Co., 146 U. S., 615, it is an authority to the effect that the indemnity lands granted by the Act of 1866 (the act involved in this case) are not open to entry, sale or pre-emption after the filing of the map of the general route of the grantee except to such grantee. It appeared in this case

that the indemnity lands granted to the Atlantic and Pacific Railroad by the Act of 1866 fell within the place limits of the Branch-Line Grant to the Southern Pacific Railroad Company under the Texas Pacific Act of 1871. It was held, however, by this Court, that, although at the time of the grant to the Southern Pacific Company the Atlantic and Pacific had made no selection of its indemnity lands, yet to allow them to be taken under the place land grant to the Southern Pacific Company would interfere with the right of selection given to the Atlantic and Pacific by the grant to it under the Act of 1866. Judge BREWER said, at page 617:

> "It might well be assumed that very likely the Atlantic and Pacific Company would be called upon to select from the indemnity lands a portion sufficient to make good the deficiency, in the granted limits. *That right of selection was a prospective right, and, if it was to be fully exercised, no adverse title could be created to any lands within the indemnity limits.*"

We fail to see the difference between a grant to a railroad company of land within the indemnity limits of a prior railroad grant and a grant to an individual of land within such indemnity

limits. If in the former case it cannot be done, as was held by Judge BREWER in the Colton case, it would seem as if the same rule must apply when the subsequent grantee is an individual and not a railroad company.

An examination of the record in this Court of the case of St. Paul & Pacific vs. Northern Pacific, 139 U. S., 1, shows that a large part of the land involved therein was within the *indemnity* limits of the grant to the Northern Pacific Railroad. One of the questions in the case was whether the subsequent grant to the St. Paul and Pacific Railroad of lands within the indemnity limits of the prior Northern Pacific grant gave the St. Paul Company a valid title thereto as against the Northern Pacific Company. It is to be noticed that the very same question was presented as appears in the case at bar, except that the subsequent grantee is here an individual, while in the Northern Pacific case it was another railroad. It was held by this Court that the indemnity lands of the Northern Pacific grant were withdrawn from the operation of any grant to another railroad company by the terms of the Northern Pacific Act (which is in substance identical with the Atlantic and Pacific Act). The

Court said, at page 9, speaking through Mr. Justice FIELD:

> "The right of the plaintiff, the Northern Pacific Railroad Company, to the lands in place along the line of its route as definitely located in the State of Minnesota, and to other lands, to make up deficiencies within those limits, caused by previous grants, sales, reservations, settlements or pre-emptions, *to be taken from the indemnity limits*, * * * will not admit of serious doubt, unless a prior right attached to those lands by an earlier grant of the United States. * * * The Northern Pacific Act directed that the President should cause the lands to be surveyed forty miles in width on both sides of the entire line of the road, after the general route should be fixed, and as fast as might be required by the construction of the road, and provided that the odd sections of lands granted should not be liable to sale, entry or pre-emption before or after they were surveyed, except by the company. They were therefore excepted by that legislation from grants, independently of the withdrawal by the Secretary of the Interior. His action in formally announcing their withdrawal was only giving publicity to what the law itself declared. *The object of the withdrawal was to preserve the land unencumbered until the completion and acceptance of the road.* * * *

> "After such withdrawal, no interest in the lands granted can be acquired against the rights of the company except by special legislative declaration, nor, indeed, in the absence of its announcement, after the general route is fixed."

The question involved in the present case has been often before the lower Federal Courts in one form or another, and has almost uniformly been decided in favor of the railroad. One of the earliest cases is Southern Pacific R. Co. vs. Wiggs, 43 Fed. Rep., 333, which involved the very same grant now before this Court and in which the facts were as follows: The land in question was within the *indemnity* limits of the Southern Pacific *Main* Line Grant and had been withdrawn from sale, entry or pre-emption at the time the respondent Wiggs filed his pre-emption claim on May 19, 1881, claiming a settlement thereon on May 15, 1868, more than a year after the railroad company filed its map of general route. Wiggs made final proofs of his pre-emption on February 19, 1884, and received a patent for the land on June 12, 1885.

On July 9, 1885, the Southern Pacific Railroad Company selected the land in controversy to make good a deficiency within the place limits of

its grant, but the selection was rejected for the single reason that, as appeared by the records of the Land Office, the land was already patented to Wiggs.

The Southern Pacific Railroad Company thereupon filed its bill in the United States Circuit Court for the Northern District of California seeking a decree declaring void and annulling the patent granted by the United States to Wiggs. The prayer of the bill was granted and the patent set aside. Judge SAWYER, in his opinion said, at page 335:

> "In this case, the right to select, in the future, this land, in the part limited for that purpose, vested, should there turn out to be a deficiency, on filing the map of definite location, thereby fixing the limit of the district for selection, although no title to the land vested till selection. The precise question now involved is not, so far as I am aware, presented in any other case. The statute itself makes a specific grant of every alternate section within certain specified limits, to which no other right has attached at the time when the line of the road becomes definitely fixed; and, in case some of the lands are lost by reason of prior interests having attached, it gives a right to select an amount equal to that so lost out of

any odd sections of public lands free from other prior claims within other specified limits of no great extent. The right to select at once vests, though the title to specific lands does not till selection is made; and, to preserve that right of selection, the statute itself, in terms, provides, that said odd sections shall not be liable to sale, or entry, or pre-emption, other than to the Company; that no pre-emption right shall be allowed in those lands specified."

After citing the sections of the act now before the Court in the present case, Judge SAWYER went on to say, at page 336:

"Thus, in express terms, it is provided, that the odd sections thus granted within the whole boundaries shall not be subject to sale, entry or pre-emption before, or after, they are surveyed, except by said Company, as provided in this act. It is apparent that Congress intended to preserve all these odd sections, within the space limited, till it could be ascertained what deficiency there would be; and the Company could supply them by selections within the prescribed limits. It permitted sales and pre-emptions, within the prescribed limits, of even sections only. Congress intended that the grants should be substantial. This case affords an illustration of the injustice of any other view. This map of definite location was

filed on January 3, 1867, whereby the limits became fixed, and the right of selection, upon the arising of the conditions, vested. The Government did not file its plat of the survey till March 17, 1881, fourteen years afterwards, and long after the completion of the road opposite the lands. Until this time it could not be ascertained whether any, or, if any, what, deficiency would exist; and, if it could be known, there could be no selection of odd sections to supply the deficiency until it could be known where the odd sections would fall, and this would require a survey. But if during all this time the lands were open to pre-emption the lands could all be taken up while the hands of the complainant were tied. In this very case the respondent initiated his pre-emption claim by settlement in 1868, but did not, because he could not, file his declaratory statement till a short time after the filing of the plat in 1881, immediately after which the contest between him and the Company, as to which had the right, commenced before the Department, and it was followed up till finally decided, a short time before the patent issued. If one pre-emptor can enter upon the land wanted, and wait ten years or more for a survey, and thereby acquire a right, while the Railroad Company must wait for a survey before it can make its selection and acquire a right thereby, all

the lands can be in that manner wrested from the Company; and of what use to it, under such conditions, would be the right to select given by the statute?

"If such a right of pre-emption exists, while the Company cannot act, all the lands which derive their greatest value from the very construction of the road, or its contemplated construction, could be wrested from the Company, even after the road is constructed, by a failure of the Government to make the survey.

"Manifestly, I think, Congress intended to withdraw from sale, entry or pre-emption, by parties other than the Company, all those lands set apart within fixed limits, as well those authorized to be selected as lieu lands, and thereby preserve the right of selection, till selection was possible to be made, as those absolutely granted in which the title itself presently vested. No time was limited by the act for selection, or limitation of time put upon the express withdrawal, either by the act or the Secretary of the Interior. A right to select which could be cut of at the sole discretion of any pre-emptioner without any fault of the Company, and without any power on its part to prevent it, would be illusory, and no right at all. By the statute the President was required to 'cause the lands to be surveyed for forty miles in width'—the whole forty miles. And the odd sections grantedwithin the

whole forty miles 'shall not be liable to sale, entry or pre-emption before or after they are surveyed, except by said Company, as provided in this act.' It does not appear to me that this language is susceptible of more than one construction, and that is that no pre-emption right could be perfected or initiated in the face of that prohibition, till Congress sees fit to withdraw it, while still in its power to do so, or till the whole claim of the Company for deficiency is both ascertained and satisfied. As Congress did not see fit to put any limitation upon the time for selection, neither the Secretary of the Interior nor the courts are authorized to prescribe such limitation."

The same question was again raised in the case of Southern Pac. R. Co. vs. Araiza, 57 Fed. Rep., 98, and again decided in favor of the railroad company by Judge Ross, then United States District Judge of the Southern District of California, who, in the course of his opinion, pointed out that the Act of 1866 withdrew the indemnity lands from sale, etc., without regard to any act of withdrawal by the Department of the Interior. As to this it was said at page 104:

"The language of the sixth section of the two acts being in substance, and almost literally, the same, the language of the Supreme

Court above quoted is equally applicable to the act in question here. If, as there held, the law itself withdraws from sale or pre-emption the odd sections to the extent of forty miles on each side of the road represented by the map of general route, manifestly it withdraws from sale or pre-emption the odd sections within the limits named in the grant on each side of the line of road as fixed by the map of definite location. Such being the true construction of the statute itself, as thus declared by the Supreme Court, it would seem to result necessarily that all of the odd sections within the indemnity as well as the primary limits of the grant contained in the Act of July 27, 1866, were withdrawn from sale or pre-emption, without regard to the order of withdrawal promulgated by the Secretary of the Interior through the Commissioner of the General Land Office, and consequently they were not open to entry or settlement at the time of the defendant's entry and settlement thereon; for, as has been seen, the Court declares that the law itself worked that result."

The case of Southern Pacific Railroad Company vs. Groeck, 87 Fed. Rep., 970, presented substantially the same question as arises in this case. The lands involved were within the indemnity limits of the Main-Line Grant to the

Southern Pacific Railroad Company, and, as was held by the Circuit Court of Appeals, had been withdrawn from settlement by the terms of the Act of July 27, 1866. The defendant, Groeck, settled upon the land in September, 1885, complied with the Land Office regulations and made pre-emption proof and payment for the land. On April 11, 1890, a patent was issued by the United States conveying the land to Groeck.

On the 2d of April, 1889, a map of the definite location of the section of the railroad between Huron and Alcalde was filed with and approved by the Secretary of the Interior, and the President of the United States accepted and approved the Commissioner's report on such section of the railroad on November 8, 1889. In July, 1891, the railroad company, acting under the direction of the Secretary of the Interior, selected the land in suit as granted by the Act of 1866 and filed a bill in the United States Circuit Court for the Southern District of California seeking to obtain a decree that Groeck held in trust for it the patent for the land which he had obtained from the United States. The decision of the Circuit Court was in favor of the railroad company upon the question now before

this Court, but against it on the question of laches, an entirely immaterial question so far as this case is concerned. The Circuit Court of Appeals, however, determined the whole case in favor of the railroad company, and held that the lands within the indemnity limits of the Southern Pacific Main-Line Grant were not open to pre-emption after the filing of the map of general route in January, 1867, but were by the terms of the Act of July, 1866, withdrawn from settlement, except by the railroad company. In the course of the decision it was said at page 972:

> "A careful consideration of other decisions of the Supreme Court determining the nature of the right which the grantee of such a grant acquires to lands within the indemnity limits, prior to the time when definite location and selection of lieu lands is made, leads us to the conclusion that, in the case of a grant such as that now under consideration, by the operation of the terms of the grant itself the indemnity lands are withdrawn from settlement from the moment when a map of the general route of the road is made and filed. It may be deduced from those decisions that the grant to the appellant conferred upon the grantee, within the indemnity limits, more than the mere right to initiate a title by selection,

and that the lands within the indemnity limits are as truly granted lands, within the terms of the act, as are the lands within the place limits. The difference is in the preliminary steps which are requisite to attach the title to the particular tracts which are granted."

(It is perhaps proper to state that an appeal on the part of the Government is pending in this court from the final decree in the case just cited.)

Keeping in view the fact that Congress passed the Act of 1866 for the purpose of giving to the plaintiff in error its full amount of ten sections of land per mile, and remembering that "it is always to be borne in mind in construing a Congressional grant that the act by which it is made is a law as well as a conveyance, and that such effect must be given to it as will carry out the intent of Congress," and that "That intent should not be defeated by applying to the grant the rules of the common law, which are properly applicable only to transfers between private parties" (Missouri, K. & T. Ry. Co. vs. Kansas Pacific Ry. Co., 97 U. S., 491, 497), we respectfully submit that the foregoing review of authorities would seem to necessarily lead to the conclusion that the

indemnity lands of the Southern Pacific Railroad Company were withdrawn from sale, entry or pre-emption by the 6th section of the Act of 1866 as soon as the map designating the line of road was filed, January 3, 1867, and were not open to sale by the United States to the defendant in error after such withdrawal and prior to selection by the plaintiff in error, and that the defendant in error holds whatever title he may have acquired by reason of the patent to him from the United States, of September 15, 1892, in trust for the Southern Pacific Railroad Company.

SECOND POINT.

The judgment of the court below should be reversed.

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